In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-233

HYMAN LEBMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

On September 11, 1970, an indictment in eighteen counts was returned against petitioner and others in the United States District Court for the Western District of Texas, charging him, *inter alia,* with aiding and abetting a firearms dealer in the unlawful sale and delivery of a Colt Cobra .38 caliber pistol to an out-of-state resident, and the defective and false recording of the transaction, in violation of 18 U.S.C. 922(b)(3), 922(b)(5), and 922(m). On June 21, 1971, petitioner pleaded guilty to these three counts. He was sentenced to concurrent prison terms of one year and fined $1,500. The jail sentences were suspended and petitioner was placed on five years' unsupervised

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probation. Petitioner's motion in arrest of judgment was denied. The court of appeals affirmed (No. 71-2281, decided June 2, 1972) (Pet. App. II). A petition for rehearing was denied on July 5, 1972. The petition for a writ of certiorari was filed on August 10, 1972, and is therefore out of time under Rule 22(2).

In any event, there is no reason to grant the writ. Relying upon *United States* v. *Bass*, 404 U.S. 336, and *Rewis* v. *United States*, 401 U.S. 808, petitioner argues that unless the government alleged and proved that his local firearms sale had an effect on interstate commerce, Congress had no power to regulate the transaction. The court below, in a comprehensive opinion discussing *Bass* and *Rewis*, properly found that Congress intended to regulate the acquisition of firearms without requiring the government to show, in each case, that the particular sale has a nexus with interstate commerce, and that as so enacted this statute is within Congress's power under the Commerce Clause. Cf. *Perez* v. *United States*, 402 U.S. 146. The courts of appeals have uniformly sustained other subsections of the present statutes against this kind of claim. *E.g.*, *United States* v. *Garner*, C.A. 7, No. 71-1626, decided July 27, 1972; *United States* v. *Nelson*, 458 F. 2d 556 (C.A. 5); *United States* v. *Crandall*, 453 F. 2d 1216 (C.A. 1). No substantial constitutional question exists.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1972.

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